MOTION FILED
JAN 14 1987

86-1159

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

TCI CABLEVISION, INC.,
COMMUNITY TELE-COMMUNICATIONS, INC.,
and TELE-COMMUNICATIONS, INC.,
Petitioners,

v.

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE MEDIA INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOE SIMS
(Counsel of Record)
KATHRYN M. FENTON
JONES, DAY, REAVIS & POGUE
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Attorneys for
The Media Institute,
Amicus Curiae

January 14, 1987

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

TCI CABLEVISION, INC.,
COMMUNITY TELE-COMMUNICATIONS, INC.,
and TELE-COMMUNICATIONS, INC.,
Petitioners,

v.

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION OF THE MEDIA INSTITUTE FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Media Institute ("the Institute") hereby respectfully moves for leave to file the attached brief amicus curiae in support of the petition for writ of certiorari in this case. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for respondent was requested but refused.

The Institute's interest in this case rises from the significant First Amendment issue raised by the decision below—whether a municipality can, consistent with the

First Amendment, issue an exclusive franchise for the provision of cable television services that excludes all other cable system operators.

The Institute is a not-for-profit, tax-exempt research organization supported by a wide range of foundations, corporations, associations and individuals. It is dedicated to the improvement of business and economic news coverage and to a robust, competitive and unfettered press. It sponsors various programs relating to new communications technologies, communications policy and First Amendmendent issues and publishes studies, books and periodicals on these issues. It has also participated through friend-of-the-court briefs in significant legal cases affecting these issues.

The decision of the United States Court of Appeals for the Eighth Circuit in this case will have a significant impact on the First Amendment rights of cable system operators and viewers of cable television programming throughout the country. The participation of the Institute as amicus curiae will permit a fuller and more complete analysis of the First Amendment issues raised.

Respectfully submitted,

JOE SIMS
(Counsel of Record)
KATHRYN M. FENTON
JONES, DAY, REAVIS & POGUE
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Attorneys for
The Media Institute,
Amicus Curiae

January 14, 1987

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. The Justifications For an Exclusive Franchise Offered by the Eighth Circuit Are Insufficient to Overcome the First Amendment's Protections	5
A. First Amendment Rights May Not Be Abridged By a Claim of "Natural Monopoly" Arising Solely From Economic Conditions	7
B. Even If a Market Will Support Only a Single Provider of Cable Television Services, The Selection of That Provider Should Be Made By Consumers In The Marketplace	10
II. The Eighth Circuit Failed to Conduct an Independent Examination of The Record That Would Establish The Lack of Support For Its Factual Conclusions	13
A. The Record Below Establishes That TCI Did Not Seek an Exclusive Franchise	13
B. The Record Below Does Not Support The Finding of a "Natural Monopoly"	14
CONCLUSION	20

TABLE OF AUTHORITIES

Cases Page

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 13, 18
Century Federal, Inc. v. City of Palo Alto, No. 85-2168 (N.D. Cal. Dec. 3, 1986) 5
Community Communications Co. v. City of Boulder (Boulder I), 630 F.2d 704 (10th Cir. 1980), *rev'd*, 445 U.S. 40 (1982) 7, 10
Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) 5, 8, 9
Miami Herald Publishing Co. v. Tornillo, 418 U.S. 242 (1974) 8, 9
Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979) 9, 12
New York Times v. Sullivan, 376 U.S. 254 (1964) .. 17
Niemotko v. Maryland, 340 U.S. 268 (1951) 6, 19
Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982) 8
Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), *aff'd and remanded*, 106 S. Ct. 2034 (1986) 3, 5, 8, 10-11
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 106 S. Ct. 2889 (1986) .. 8
Time, Inc. v. Pape, 401 U.S. 279 (1971) 19

Statutes

Cable Communications Policy Act of 1984, P.L. 98-549 12
Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.* 9

Miscellaneous

FCC Dkt. No. MM 85-349 (Aug. 7, 1986) 7
Hazlett, "Competition vs. Franchise Monopoly in Cable Television," 4 *Contemporary Policy Issues* 80 (Apr. 1986) 11, 17
Hazlett, "Why Cable TV Needs a Free Market," *N.Y. Times*, Nov. 17, 1985 at 2F Col. 3 11
B. Owen, *Economics and Freedom of Expression* (1975) 16-17

TABLE OF AUTHORITIES—Continued

Page

Owen & Greenhalgh, "Competitive Considerations in Cable Television Franchising," 4 Contemporary Policy Issues 69 (Apr. 1986) 11, 17

Paul Kagan Associates, Inc., *Cable TV Franchising* (Nov. 20, 1985) 13

Smiley, "Direct Competition Among Cable Television Systems, EAG Discussion Paper 86-9, Antitrust Division, U.S. Dept. of Justice (June 5, 1986) 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. ———

TCI CABLEVISION, INC.,
COMMUNITY TELE-COMMUNICATIONS, INC.,
and TELE-COMMUNICATIONS, INC.,
Petitioners,

v.

CENTRAL TELECOMMUNICATIONS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF THE MEDIA INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Media Institute ("the Institute"), a not-for-profit, tax-exempt research organization, is dedicated to the improvement of business and economic coverage and to a robust, competitive and unfettered press.[1] The issue decided in this case by the United States Court of Appeals for the Eighth Circuit—whether a municipality's grant of an exclusive cable franchise is prohibited by the First

---

[1] The Institute sponsors various programs related to business/media relations, new communications technologies, communications policy, and First Amendment issues, and publishes studies, books, and periodicals on media-related topics. In addition, it participates through friend-of-the-court briefs in significant legal cases affecting these interests.

Amendment—is thus of considerable concern to the Institute. The Institute submits that the decision below is erroneous in concluding, on the record in this case and the current state of economic knowledge, that the provision of cable television services in Jefferson City was in fact a natural monopoly. Since that finding is critical to the court's conclusion that Jefferson City could award an exclusive franchise consistent with the First Amendment, and establishes an erroneous precedent with widespread ramifications for the First Amendment rights of cable system operators and viewers, the decision below is fatally flawed and must be reversed.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case, arising from an all-too-common dispute over the municipal award of an exclusive cable television franchise, raises a significant issue concerning the First Amendment rights of cable system operators and viewers. A judgment of the District Court for the Western District of Missouri (reported at 610 F. Supp. 891 (W.D. Mo. 1985)) incorporated a jury verdict against petitioners TCI Cablevision, Inc. and affiliated companies (collectively, "TCI") and in favor of respondent Central Telecommunications, Inc. ("Central"), a disappointed applicant for the cable television franchise to be awarded by Jefferson City, Missouri ("the City"). The jury found that TCI, the existing holder of the City's cable television franchise, had violated the federal antitrust laws and tortiously interfered with Central's business expectancy, and awarded Central damages of approximately $36 million. The U.S. Court of Appeals for the Eighth Circuit subsequently affirmed this judgment. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986).

2. In affirming the jury verdict, the Eighth Circuit rejected TCI's argument that it had a right guaranteed by the First Amendment to offer cable television service with or without a franchise from the City, and that, as a result, Central could not have been damaged by its failure to receive an exclusive franchise. Instead, the

court concluded that "the 'natural monopoly' characteristics of the Jefferson City franchise justified the City in offering a de facto exclusive franchise." 800 F.2d at 717.

3. This conclusion is inconsistent with the First Amendment's guarantee of a free press and must be reversed. As this Court recognized last year in *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986), the activities of cable television system operators (and viewers) "plainly implicate First Amendment interests." *Id.* at 2037. Given such protected interests, an exclusive cable franchise, which precludes all but one cable system operator from communicating with the viewing public, raises significant concerns. The abridgement of First Amendment rights resulting from a grant of an exclusive franchise cannot be justified here by the claim of a "natural monopoly" resulting from economic conditions.

4. The factual record below does not support the court's conclusion that cable television in Jefferson City is a "natural monopoly," and economic theory suggests that no such "natural monopoly" exists. Rather, both the existing record and the likely result of any economic analysis would support the opposite conclusion—that cable television in Jefferson City is not inevitably monopolistic and indeed is only a part of an intensely competitive entertainment and information market. The First Amendment thus clearly forbids the exclusion of TCI or any other cable operator from disseminating programming and competing for viewers in Jefferson City or any other community.

5. Even if Jefferson City, for some reason not apparent on the record, proved to be a market that would support only a single provider of cable television services, the First Amendment bars a governmental choice of the only cable speaker. The district court's conclusion, approved by the court of appeals, that "since only one competitor can survive in the market, it makes sense to allow the local government to choose the best applicant" (800 F.2d at 714) is thus fundamentally inconsistent with the

First Amendment. If there is to be only one cable operator in a community, the First Amendment requires that choice be made by the citizens of the community functioning as purchasers in the marketplace, not by municipal fiat.

6. In rejecting TCI's First Amendment right to operate a non-exclusive cable franchise, the Eighth Circuit failed to undertake an independent review of the record supporting its natural monopoly conclusion. As this Court has repeatedly recognized, the importance of preserving constitutional rights requires that decisions regarding entitlement to such protection cannot be left merely as questions for the trier of fact. An "independent examination of the whole record" by the reviewing court is required before approving a limitation of free expression. Such a review was lacking below.

7. Because the Eighth Circuit's decision subjugates important First Amendment rights to a municipal government's desire to select a particular cable television operator as the sole provider of cable services, it cannot be allowed to stand. Such a limitation on the First Amendment rights is contrary to prior decisions of this Court and is inconsistent with recent decisions of other circuits. If the Eighth Circuit's decision is not reversed, it will have an impact well beyond the boundaries of this case. Cable television and other new technologies are growing in importance as means of disseminating news, information and entertainment. The Eighth Circuit's decision will significantly deter the development of cable systems and other new technologies as alternative voices, protected by the First Amendment to the same extent as the more traditional methods. The petition for certiorari should therefore be granted and the judgment below reversed.

ARGUMENT

I. The Justifications For an Exclusive Francise Offered by the Eighth Circuit Are Insufficient to Overcome the First Amendment's Protections.

Despite its recognition that "there are profound first amendment implications inherent in the regulation of cable operators" (800 F.2d at 716), the Eighth Circuit concluded that cable television in Jefferson City was a natural monopoly and that the City could award an exclusive cable franchise. *Id.* at 717. It is beyond dispute that the activities of cable system operators and viewers are protected by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S. Ct. 2034, 2036 (1986). Although this Court in *Preferred* reserved decision on the precise contours of that First Amendment protection,[2] the approach taken by the Eighth Circuit is plainly inconsistent with the First Amendment and with prior decisions of this Court. Because of the current confusion regarding the application of the First Amendment to the activities of cable system operators[3] and the conflict with the decisions of other circuit courts,[4] the petition for certiorari should be granted.

---

[2] *See* 106 S. Ct. at 2038 ("We do not think, however, that it is desirable to express any more detailed views on the proper resolution of the First Amendment question raised . . . without a fuller development of the disputed issues in this case.").

[3] For example, in a decision issued after the Eighth Circuit's decision in this case, the U.S. District Court for the Northern District of California rejected an attempt by a municipality to issue an exclusive cable television franchise and held that the full protection of the First Amendment is available to cable speakers because "cable television is more closely analogous to newspapers than the broadcast media." *Century Federal, Inc. v. City of Palo Alto*, No. 85-2168, slip op. at 2, 20-23 (N.D. Cal. Dec. 3, 1986).

[4] Both the Ninth and the D.C. Circuits have recognized a more expansive scope of First Amendment protection for the activities of cable system operators than that afforded by the Eighth Circuit here. *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1401-02 (9th Cir. 1985), *aff'd on other grounds*, 106 S. Ct. 2034 (1986); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977).

The Eighth Circuit offered two reasons for rejecting TCI's First Amendment claims:

> First, the evidence reveals that TCI was not sincere in advocating competition in the market but simply sought to retain a monopoly originally gained through the grant of a de facto exclusive franchise. Second, the evidence reveals that the City's cable television market is currently a natural monopoly which, under present technology, offers room for only one operator at a time. Thus, we hold that the City could properly offer a de facto exclusive franchise in order to create competition for its cable television market.

800 F.2d at 717. Apart from the inherent contradiction in the court's reasoning (*i.e.*, that an award of an exclusive franchise will promote competition), neither of these rationales provides a supportable basis for abridging TCI's First Amendment right to operate a cable system in Jefferson City. First, even assuming the court's characterization was accurate,[5] TCI's "sincerity" or the lack of it regarding its willingness to operate a non-exclusive cable franchise is simply not relevant to any First Amendment analysis.[6] It is equally clear that an alleged "natural monopoly" arising solely from economic conditions does not permit governmental regulation of the number of cable speakers.

---

[5] *See* pages 13-14 *infra*.

[6] It is an essential principle of First Amendment analysis that entitlement to this constitutional protection does not depend upon a court's, the government's or society's assessment of the character of the speaker. *See, e.g., Niemotko v. Maryland*, 340 U.S. 268, 272 (1951) ("the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments has a firmer foundation than the whims or personal opinions of a local governing body"). Even if the facts of this case do not present TCI in the most sympathetic light, to the extent that the court's assessment of the relative characters of the competing applicants for the cable franchise influenced its analysis of the First Amendment issue, it was clearly inappropriate.

A. First Amendment Rights May Not Be Abridged By a Claim of "Natural Monopoly" Arising Solely From Economic Conditions.

The "natural monopoly" theory relied on by the Eighth Circuit was summarized as follows:

> [T]his grant of a single cable franchise is permissible only if the physical and economic conditions of the relevant market give rise to a "natural monopoly" situation. The theory is that, where physical and economic factors render a market incapable of accommodating more than one cable television system, the local governing body is in the best position to determine which proposed system offers the best service to the public for the lowest cost. Since only one competitor can survive in the market, it makes sense to allow the local government to choose the best applicant.

800 F.2d at 714 (quoting 610 F. Supp. at 899-900).

It is clear, however, that "physical conditions" do not make cable television a "natural monopoly." Unlike broadcasting, where the need for proper spacing to avoid interference along the electromagnetic spectrum in fact imposes physical limitations on the number of broadcast providers, operation of multiple cable television systems is not similarly constrained.[7] This has led every other

---

[7] The argument that poles can only accommodate one set of cable wires is no longer plausible given present technology. *See, e.g., Community Communications Co. v. City of Boulder (Boulder I)*, 630 F.2d 704, 712 (10th Cir. 1980) (Markey, J., dissenting) ("[A]s the record makes clear, modern technology makes free and open competition both practically and economically available to the city by at least four competing cable communicators."), *rev'd*, 445 U.S. 40 (1982). Moreover, as the Federal Communications Commission recognized in a recent Notice of Inquiry concerning the provision of cable television services by telephone operating companies, telephone facilities (which at present reach almost every U.S. home) could readily be used for the carriage of cable signals in the absence of public policy decisions to the contrary. *See* FCC Dkt. No. MM 85-349 (Aug. 7, 1986). Finally, of course, there are many alternative technologies providing most of the services offered by cable that do not utilize cable wires. *See* page 18 *infra*.

court that has recently considered the issue to conclude that the physical scarcity rationale used to justify regulation of broadcast entities does not apply to cable.[8]

Thus, the Eighth Circuit is left with the theory that "economic factors render a market incapable of accommodating more than one cable television system." 800 F.2d at 714. Even if factually correct, this "economic scarcity" rationale has explicitly been rejected by this Court as a basis for governmental regulation of the media. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), this Court struck down a state statute granting political candidates a right to equal space to reply to criticisms published in newspapers. Despite acknowledging that most newspapers possessed a monopoly in their areas of distribution (the only fact that appears to support the "natural monopoly" conclusion of the panel in this case), *Tornillo* rejected the argument that the states could impose a limited right of access to the press merely because economic conditions made entry into newspaper markets difficult.

In reaching this decision, this Court found that "[T]he same economic factors which have caused the disappearance of vast numbers of metropolitan newspapers [make] entry into the marketplace of ideas served by the print

---

[8] *See, e.g., Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1404 (9th Cir. 1985) (recognizing that cable technology has evolved significantly and that the physical scarcity rationale no longer applies), *aff'd and remanded*, 106 S. Ct. 2034 (1986); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1449 (D.C. Cir. 1985) ("[physical] 'scarcity' rationale has no place in evaluating government regulation of cable television"), *cert. denied*, 106 S. Ct. 2889 (1986); *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982) ("Frequency interference [is] a problem that does not arise with cable television."); *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 44-45 (D.C. Cir.) ("An essential precondition of [broadcast] theory—physical interference and scarcity requiring an umpiring role for government—is absent."), *cert. denied*, 434 U.S. 829 (1977).

media almost impossible." *Id.* at 251 (footnote omitted).[9] Yet even though economic conditions were likely to dictate only a single daily newspaper (in many cases commonly-owned with other communications media), this Court held that the restriction on speech resulting from the state right of reply statute—a restriction several orders of magnitude less severe than the absolute exclusion sanctioned by the Eighth Circuit in this case—could not be justified under the First Amendment. *Id.* at 258.

As the D.C. Circuit has already recognized, the principles of *Tornillo* are clearly applicable to cable television services.[10] All forms of media are characterized by certain economies of scale that may result, in some instances, in the emergence of a single seller in a particular locality. Under the analysis utilized by the Eighth Circuit, virtually any community (which experience has shown is likely to support only a single daily newspaper) would be entitled to offer an exclusive franchise for the newspaper publishing business. Yet it is inconceivable that any court would, solely on the basis of economic conditions, permit a municipality to create an exclusive franchise for one newspaper and to exclude all others.

Cable television should be no different. The designation of an exclusive cable franchise and the prohibition

---

[9] By 1973 effective newspaper competition existed in only 4 percent of U.S. cities. 418 U.S. at 249, n.13. Recognition of the economic constraints affecting daily newspapers had prompted passage of the Newspaper Preservation Act, 15 U.S.C. § 1801 *et seq.*, which permits, under certain circumstances, combination of the physical production facilities of two newspapers to preserve separate and independent editorial voices.

[10] *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 46 (D.C. Cir.) (scarcity resulting from economic conditions is insufficient to justify even limited government intrusion into First Amendment rights; "there is nothing in the record before us to suggest a constitutional distinction between cable television and newspapers on this point"), *cert. denied*, 434 U.S. 829 (1977). Indeed, the Eighth Circuit had previously cited *Home Box Office* with approval on this point. *Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1055 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

of all other cable system operators simply cannot be reconciled with the First Amendment. The Eighth Circuit's failure to recognize this fact has grave implications for the future effectiveness of cable and other new technologies as developing methods of communications.

B. Even If a Market Will Support Only a Single Provider of Cable Television Services, The Selection of That Provider Should Be Made By Consumers In The Marketplace.

The error represented by the designation of an exclusive cable television franchise is compounded by the City's role in selecting the operator of that franchise. Even if the Jefferson City market should prove able to support only a single provider of cable television services, the First Amendment forbids the selection of the exclusive cable speaker by the government. The desire to dictate the sole provider of cable television communications "cannot serve as the articulated, compelling state or governmental interest required to justify an otherwise constitutionally prohibited silencing of the right of free speech and free press." [11] Yet this is just what the Eighth Circuit permits by endorsing the grant of an exclusive cable franchise and municipal selection of its operator.

This procedure is no more consistent with the First Amendment than allowing a municipality to designate a particular newspaper to serve its community simply because the city council concluded that it could support only one newspaper. As the Ninth Circuit has found:

> Allowing a [franchising] procedure such as the City's would be akin to allowing the government discretion to grant a permit for the operation of newspaper vending machines located on public streets only to the newspaper that the government believes "best" serves the community, a practice which we find clearly invalid.

---

[11] *Community Communications Co. v. City of Boulder (Boulder I)*, 630 F.2d 704, 713 (10th Cir. 1980) (Markey, J., dissenting), *rev'd*, 455 U.S. 40 (1982).

Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d at 1409.

No sound argument supports the claim that franchising contests conducted by political entities are better able to select cable firms than consumers who vote with their dollars by choosing among competing offerings. While "[c]ompetitive incentives can usually ensure responsive service, efficient production, and cost-based pricing," it is generally conceded that "[r]egulation generally does not have as enviable a record." [12] The limitations of municipal action to award cable franchises are well known, as is evidenced by the delays associated with bringing cable services to many of the nation's largest cities.[13] Moreover, the level of economic waste introduced by the cable franchising process itself and by the over-investment required by the political competition for the franchise is significant.[14]

Against this record, a competitive marketplace solution, even if it results in only one surviving firm, is much more likely to ensure that that firm is best able to

---

[12] *See* Owen & Greenhalgh, "Competitive Considerations in Cable Television Francising," 4 *Contemporary Policy Issues* 69, 71 (Apr. 1986).

[13] *See, e.g.*, Hazlett, "Why Cable TV Needs a Free Market," *N.Y. Times*, Nov. 17, 1985 at 2F, col. 3 (Philadelphia has gone through five franchising battles since the 1960's and is still without cable).

[14] One study has concluded that the costs imposed by the franchising process on cable consumers and suppliers equal one-fourth of total revenue or more than twice the level of pre-tax profit. Hazlett, "Competition vs. Franchise Monopoly in Cable Television," 4 *Contemporary Policy Issues* 80, 95 (Apr. 1986). The political nature of these franchising battles is demonstrated here by the fact that Central sought the aid of a number of politically well-connected persons in an attempt to influence the franchise award. For example, one of the principals of Central, Eugene Bushman, had not previously worked in the cable industry but had been a political lobbyist and attempted to use his political connections in the franchising process. *See, e.g.*, PX 334 (letter authored by Bushman invoking name of Senator Eagleton without his knowledge or authorization in attempt to obtain bond broker).

serve the wants and desires of the public. The continuing existence of competition fueled by the presence of actual competitors or the possibility of new entry in the marketplace is more likely to produce superior performance than that of a monopolist awarded an exclusive franchise by the municipality and thereafter immunized from any competition.[15]

In addition to its logical force, this argument is consistent with the command of the First Amendment to avoid governmental actions to control the content of speech by selecting the conduit for it.[16] In the absence of conditions such as the physical scarcity that justifies broadcast regulations, the First Amendment prohibits government action that selects those who will be permitted to speak or the content of that message.[17]

---

[15] Indeed, the passage of the Cable Communications Policy Act of 1984, P.L. 98-549, which largely eliminated the authority of municipalities to impose rate regulation on cable systems, places significant limitations on municipal regulation of cable companies. Because of this, "It is reasonable to conclude that overbuild competition has a potentially significant welfare-enhancing role and that municipalities and operators may opt for overbuilding more often than in the past." Smiley, "Direct Competition Among Cable Television Systems," EAG Discussion Paper 86-9, Antitrust Division, U.S. Dep't of Justice at 35 (June 5, 1986).

[16] *See Midwest Video Corp. v. FCC*, 571 F.2d 1025, 1053 (8th Cir. 1978).

[17] The Eighth Circuit recognized this pitfall but attempted to side-step it by disclaiming "We note that there is no question here of content regulation in determining who would be the 'best' applicant." 800 F.2d at 714, n.4. This effort is futile, however, for the court clearly relied on the alleged superiority of Central's franchise proposal as a basis for rejecting TCI's First Amendment claims. *See, e.g.*, 800 F.2d at 717 ("Central's proposal went further in advancing the first amendment interests of the viewing public in the greatest variety of programming available."). Such content-based determinations are an inevitable consequence of governmental determination of the only cable speaker. Furthermore, as noted above, the history of the cable industry has shown that municipal franchising procedures often invite "overbidding" by weighting the decisional process in favor of expensive, frequently impractical, cable systems. In city after city, once these promises of technologi-

II. The Eighth Circuit Failed to Conduct an Independent Examination of The Entire Record Prior to Approving a Limitation of TCI's First Amendment Rights.

The abridgement of First Amendment rights sanctioned by the Eighth Circuit becomes even more egregious given the lack of factual support in the record for its rejection of TCI's First Amendment claims. Where First Amendment rights are involved, this Court has required that an appellate court conduct an "independent examination of the whole record" before approving a limitation of free expression. *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984). Since this examination was lacking here, the Eighth Circuit's decision must be reversed.

A. The Record Below Establishes That TCI Did Not Seek an Exclusive Franchise.

The Eighth Circuit's first basis for rejecting TCI's First Amendment claim—the company's alleged "insincerity" in advocating competition—reflects the court's view that "TCI's first amendment defense fails on its facts because it did not seek to simply remain in the market but to continue its monopoly." 800 F.2d at 713. The court cites no specific factual evidence in support of this conclusion, apart from the assertion that TCI "began a campaign, accompanied by various unethical and illegal acts, to coerce the city to grant it an exclusive franchise." *Id.* at 712-13.

There is abundant evidence in the record, however, that TCI never sought an exclusive franchise and that, while not welcoming the prospect of additional competition (as few businessmen would), it was fully prepared to deal

---

cally advanced systems prove impossible to implement, they are eliminated through renegotiation. *See, e.g.*, Paul Kagan Associates, Inc., *Cable TV Francising* (Nov. 20, 1985) at 4-5 (70% of the initial franchises awarded in major markets since 1975 have already been renegotiated). Thus, the alleged superiority of a proposed system may never be fully realized and a court's reliance on such superiority in making First Amendment decisions would be unfounded.

with such competition in the marketplace.[18] None of this evidence is even discussed by the court.[19]

B. The Record Below Does Not Support The Finding of a "Natural Monopoly."

The court's reliance on a finding that cable television in Jefferson City was a natural monopoly is equally flawed. The opinion devotes less than one page to this critical issue, stating only that the "natural monopoly" was proven "to the satisfaction of the jury and the trial judge," and that there is "substantial support in the record" for that conclusion. 800 F.2d at 717. The only record evidence cited by the court to support its "natural monopoly" finding—a consultant's study prepared on be-

---

[18] As TCI's President John Malone testified, "[W]hile we didn't encourage competition, we accepted it as a fact of life." Malone, 30 Tr. 88. In an advertisement directed to the customers of TCI Cablevision, TCI opposed Central's request for an exclusive franchise and stated:

> TCI believes that the citizens of Jefferson City (and eventually Cole County) should be the ultimate judges of the competing service offered by the two companies . . . TCI has no objection if the City enters into contracts with competitors of TCI, but feels that it, too, has a right to do business in Jefferson City.

DX 61. In various discussions with the City Council, TCI's representatives also repeatedly recognized that TCI's contract was not exclusive and that they were fully prepared to meet competition from another cable company. DX 75; PX 53; PX 144, p. 12.

[19] Other findings relating to TCI's conduct and motivations appear similarly unsupported. One incident, emphasized by the district court, was the alleged attempt by TCI "to intimidate city officials by threatening to flood the . . . City market with satellite dishes if defendants' franchise was not renewed." 610 F. Supp. at 895. Yet this "threat" appears nowhere in the record. At one Council meeting, a TCI representative stated that TCI was familiar with the problem of illegal interception of satellite-delivered programming because it was "the largest distributor in the nation of backyard dishes," with "an exclusive in seventeen states including Missouri." PX 144, p. 23. It is hard to see the "threat" in such a statement and Central's attorney described the issue as "[n]ot particularly relevant in this case." 32 Tr. 35.

half of Central for this litigation [20]—is hardly an overwhelming basis to support this critical economic determination.

Other record evidence is contrary to this conclusion. A starting point for any analysis of the natural monopoly issue should be the competitive conditions that shape the market for cable television, yet the Eighth Circuit pays no attention to the unique characteristics of Jefferson City. For example, the City's geography makes reception of over-the-air broadcast signals very difficult. 610 F. Supp. at 894, n.3. As a result, cable penetration rates would be expected to be very high,[21] a fact that would make competitive cable operations more likely than in other communities.[22] This was particularly so given the fact that overbuilds appear to stimulate more community interest in cable, thereby leading to more total subscribers. Malone, 30 Tr. 53.

From a technical standpoint, there was nothing that would prohibit more than one cable company from operating a cable system in Jefferson City.[23] Yet no one at

---

[20] *See* 800 F.2d at 717 n.6.

[21] Trial testimony established that, as a general rule, between 30 and 40 subscribers per mile are necessary to operate a profitable system. *E.g.*, Sparkman, 26 Tr. 160-61. In 1981, TCI had achieved a penetration rate for the City of 65.5 subscribers per mile and in 1982, 68 subscribers per mile. PX 171(c).

[22] Jefferson City was described by one of Central's proposed bankers as "virtually an ideal franchise. It's a long distance from broadcast programming. It's a hilly country, has a pretty good density for a city of this population . . . offering the potential for 60%-70% subscription rate." Haynes, 19 Tr. 61. One of Central's economic witnesses similarly testified that the high subscriber rate in the City demonstrated "that cable tv was a very saleable product in Jefferson City." Perry, 28 Tr. 83.

[23] TCI leased the use of a strand for coaxial cable support from the telephone company, United Telephone (PX 2) and TCI had no control over who could use the strand. Lee, 27 Tr. 53-53. There apparently were no technical or legal reasons why two or more cables could not be lashed to a single strand, a process called "bundling"

Central had ever made an effort to find out what it would cost to place a second set of cables on the existing poles. Schott, 6 Tr. 8.[24]

Moreover, based on Central's own damage theory, the likely profitability of the Jefferson City franchise belies the existence of a natural monopoly. The exceedingly high rate of return on investment represented by the jury's award of $10.8 million in compensatory damages reflects a level of anticipated profits from the operation of the cable system that would be certain to attract competitive entry into the market.

The Eighth Circuit also failed to even acknowledge the existence of (much less give any consideration to) the general body of economic learning relevant to the "natural monopoly" issue, particularly recent economic studies raising serious questions about the application of the natural monopoly theory to the cable television industry. It is undisputed that operation of a cable television system requires a significant capital investment in both facilities and equipment, and that economies of scale arise as these fixed costs are spread over larger and larger numbers of subscribers.[25] Nevertheless, the historical wisdom that

---

of cables. Schott, 5 Tr. 45-46; Lee, 27 Tr. 51-52. One of the principals of Central admitted that a cable company he had previously owned had shared a strand on the same poles with another cable company (Schott, 6 Tr. 21).

[24] One factor that would affect the viability of Central's proposal in an overbuild contest was its higher cost. The total cost of the system Central proposed to build was higher than would otherwise be necessary, since it originally included an institutional loop, a large amount of free services for the city, expensive local studies, and addressable converters. Graham, 4 Tr. 45-46. This, of course, would require a larger number of subscribers than a lower cost system to reach the break even point.

[25] Cable television is not unique in this regard, for economies of scale arise as all media products are shared with increasing numbers of viewers or readers. For example, the cost of producing (and, in the case of broadcast television, distributing), a book, television show or newspaper article remains unchanged whether

such investment and scale economies represent an insuperable barrier to competitive cable operations is increasingly being challenged, and recent economic studies have failed to support this theory.[26]

The experience of those areas where cable systems currently do compete shows that such competition is not only possible, but appears to produce the consumer benefits, including lower prices, that one expects from competition.[27] This is not consistent with the existence of a "natural monopoly."

Moreover, recent evidence of successful competition in other markets long thought to be "natural monopolies" should make one skeptical of similar claims in cable markets. Long distance telephone service was supposed to represent a "natural monopoly," but now—after regulatory intervention to end the monopoly—it turns out that the monopoly was not "natural" after all. Overnight mail delivery service is another example of an industry where

---

they are read or viewed by one person or one million. *See, e.g.*, B. Owen, *Economics and Freedom of Expression* 19 (1975).

[26] *See, e.g.*, Owen & Greenhalgh, *supra* note 12, at 78. While these authors of a recent study of overbuild costs found a 14 percent penalty in unit costs per subscriber resulting from head-to-head competition between two cable systems operating down the same streets (the worst case scenario in terms of overbuilt systems), they concluded that:

> Although this is hardly negligible, it is within the range of monopoly markups that might be expected in the absence of competition or effective regulation. Therefore, consumers might be better off with competition, in spite of the cost penalty from lost scale economies.

Id. at 76.

[27] Hazlett, *supra* note 14, at 91 (duplicative systems' rates for basic cable service and HBO were estimated to be $1.82/month lower than those of monopoly jurisdictions, providing "direct evidence that monopoly franchising tends to raise prices to consumers").

competition should not be possible under the "natural monopoly" theory.[28]

Indeed, cable seems much less likely than either of these examples to constitute a "natural monopoly" since cable television must compete in a broad entertainment and information market with many similar services (including, at a minimum, over-the-air broadcast services, videocassettes, newspapers, magazines, movies, theaters, and books). Whether viewed as part of a broad entertainment and information market, or merely as part of a narrower video programming market, cable operators hardly have the luxury of a monopoly hold over consumers. Thus, the "natural monopoly" conclusion on which the Eighth Circuit's opinion rests is not only not supported by the record, it is very likely to be just plain wrong.

In sum, the Eighth Circuit simply assumed the conclusion that "there was economic capacity for only one speaker." 800 F.2d at 717. It conducted no independent analysis of that issue and the analysis of the district court was demonstratively inadequate. Given the importance of the First Amendment interests at stake and the impact of that conclusion on those interests, the court's review of this issue was not consistent with controlling decisions of this Court.

In cases involving the First Amendment, this Court has repeatedly held that "an appellate court has an obligation to 'make an independent examination of the

---

[28] The U.S. Postal Service already possessed an existing infrastructure through its government monopoly over first class mail delivery, any newcomer would have to duplicate an extensive system of local offices, delivery routes, sorting facilities, etc., and the economies of scale clearly involved would likely permit a single firm to serve the entire market at a lower per unit cost than two or more firms. Yet the successful entry of and competition introduced by firms such as Federal Express, Emery, Purolator Courier, DHL, Airborne and others completely destroys the "natural monopoly" hypothesis in this industry.

whole record' in order to make sure 'that the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 284-86 (1964)).[29] Here, the Eighth Circuit's failure to conduct this independent examination is particularly troublesome given the absolute ban on the exercise of First Amendment rights represented by an exclusive franchise. As the district court in this case recognized, "[I]f the market has room for more than one cable system, a city's efforts to artificially limit the number of operators would constitute a prior restraint in violation of the First Amendment." 610 F. Supp. at 901. Such is clearly the case here.

---

[29] This requirement reflects "a deeply held conviction that judges —and particularly members of this Court—must exercise such review in order to preserve liberties established and ordained by the Constitution." 466 U.S. at 510-511. As a result, it is a

> [S]ettled principle that "[i]n cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will examine the evidentiary basis on which those conclusions are founded."

Time, Inc. v. Pape, 401 U.S. 279, 284 (1971) (quoting *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951)).

CONCLUSION

For the reasons stated above, the decision of the Eighth Circuit in this case erroneously limits an important constitutional right. In order to prevent this error from further infecting the First Amendment rights of cable system operators, the Institute respectfully requests that the petition for a writ of certiorari be granted so that the judgment below can be reversed.

Respectfully submitted,

JOE SIMS
(Counsel of Record)
KATHRYN M. FENTON
JONES, DAY, REAVIS & POGUE
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Attorneys for
The Media Institute,
Amicus Curiae

January 14, 1987